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IN THE SUPREME COURT OF THE UNITED STATES

No. --------

OCTOBER TERM, 1970

GEORGE W. RILEY and
GOLDIE I. RILEY,
Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit made and entered the 28th day of January, 1970.

COMMENT IN LIMINE

This case may be unique in that in the trial court it was tried to a jury without a witness testifying for either side. Plaintiffs submitted eight (8) Exhibits consisting of the insurance policy, copy of a Michigan state court Judgment, and six (6) letters. Defendant submitted one (1) Exhibit, its "raw" file.

OPINIONS BELOW

The case was tried by jury in the United States District Court for the Western District of Michigan, Southern Division; and Judgment pursuant to jury verdict was entered October 23, 1968, reprinted as Appendix 1 annexed hereto.

Motion for a judgment notwithstanding the verdict was made by defendant; and denied by Opinion and Order of the trial judge entered January 8, 1969, reprinted here as Appendix 2 annexed hereto.

Defendant appealed to the United States Circuit Court for the Sixth Circuit; and the Opinion and Judgment of that court was entered January 28, 1970, reprinted here as Appendix 3 annexed hereto.

Plaintiffs-Appellees filed Petition For Rehearing and Suggestion For Rehearing En Banc, received by the Clerk of Court from the printer several days after the expiration of 14 days from the judgment entry date. Motion was thereupon filed for extension of time to file same; and such Motion denied by Order dated March 6, 1970, reprinted here as Appendix 4 hereto.

JURISDICTION

Jurisdiction of this court is invoked under favor of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether it was proper for the Circuit Court of Appeals for the Sixth Circuit to "pass to the trial" the timely Motion of Plaintiffs-Appellees to Dismiss the appeal, and fail to decide same at the latter time, eliding any reference in Opinion and Judgment?

2. Whether the Opinion and Judgment of the Circuit Court of Appeals as rendered by the majority should be allowed to stand without review and revision by this court when it is clearly contrary to long-established settled law

in Michigan, and reverses a consistent and uniform line of Michigan Supreme Court cases citing back to 1917 and culminating in 1967; and likewise reverses a Michigan Court of Appeals case consistent therewith and directly in point with the case at bar decided in December, 1969?

3. Whether the basic premise and pivotal point of majority Opinion and Judgment, i.e. that State Farm Automobile Insurance Company had but "three days" to react to Rileys' notice that they were prosecuting to judgment (Appendix 3, p. 31 note 5), is fallacious; and said insurer did in fact have 23 days to intervene and appeal, should it elect such procedure, and *3 days and 4 months* after such notice to intervene and move to set aside the Riley judgment under applicable Michigan General Court Rules?

4. Whether the jury-found waiver of arbitration made the exclusion clause (Insuring Agreement III(a), Appendix 3, p. 29) inoperative as being ancillary to and merely an adjunct of the arbitrary process?

5. Whether the exclusion clause referenced in 4 above, as used commonly and on a nationwide basis as a part and parcel of "uninsured motorist" endorsements in automobile policies, is void as against public policy and should be so held by this court at earliest opportunity?

6. Whether reasonable minds could differ on the question of waiver, by respondent here, of arbitration under the policy, where said respondent denied any liability whatsoever, stating by letter it considered the matter "closed and requires no further action" and that it was "unable to consider any coverage U payment" (Appendix 3, p. 35, dissent of Celebrezze, Circuit Judge)?

STATEMENT OF THE CASE

This action was instituted by the petitioners as the insureds against respondent as their automobile insurer in the United States District Court for the Western District of Michigan, Southern Division. Jurisdiction was based on diversity of citizenship. The action was for a declaratory judgment under the uninsured motorist clause of petitioners' automobile insurance policy issued by respond-

ent State Farm Mutual Automobile Insurance Company (hereafter, State Farm).

The claim of petitioners arose from an automobile accident which occurred December 12, 1963, the vehicle of petitioners colliding with a truck operated by one Williams and owned by his father. Both petitioners suffered personal injuries, petitioner Goldie I. Riley suffering severe personal injuries permanently incapacitating both lower limbs and rendering her a wheelchair invalid for the balance of her life.

State Farm investigated the accident, determined petitioner George W. Riley was at fault, and without notice to or knowledge of Riley, settled and paid a claim for damages asserted by the Williams against Riley. On learning this at later time Riley informed a representative of State Farm that it had the facts of the accident all wrong; and that the driver Williams was solely at fault, having driven his truck through a red light before colliding with the Riley vehicle.

[It must be here stated, parenthetically, that although the time factor in this connection was not raised in the trial court, it was emphasized in the majority opinion in the Court of Appeals, i.e. "nearly two years later" (O-25), "until more than two years after the accident occurred" (O-31), "more than two years after the accident" (O-32, Appendix 3) which perforce requires explanation albeit dehors the trial record. Both of the Williams promptly disappeared immediately on receiving the State Farm payments on their claims. A detective agency could not trace them. The Rileys, both being injured and hospitalized from the accident, had no contact at the time whatsoever with either of the Williams. Just prior to November 26, 1965 the Williams were finally located in a county distant from the county of their residence at the time of the accident].

On November 26, 1965 petitioners filed suit against the Williams in the Circuit Court of Mecosta County, Michigan, without the knowledge or consent of State Farm orally or in writing, and obtained personal service on both Williams as defendants in that action. Neither of the Williams appeared or defended. On January 17, 1966 petitioners' counsel wrote a letter to State Farm inform-

ing the latter of such default and enclosing a copy of the Summons and Complaint in that action, stating that he intended to take a default judgment against the Williams on January 20, 1966, the "special day" of court in Mecosta County for that month, in said letter stating that State Farm "must have been under a gross misconception of the accident facts" when it paid its money in settlement of the claims asserted by the Williams against Riley. On January 20, 1966 petitioners submitted testimony and proofs and obtained a default Judgment against the Williams in the amount of $25,000.00 as to petitioner George W. Riley, and $125,000.00 as to petitioner Goldie I. Riley, plus costs.

On February 4, 1966 counsel for petitioners again wrote to State Farm enclosing a copy of the default Judgment and making claim and demand pursuant to same under the uninsured automobile clause of the State Farm policy. On February 9, 1966 State Farm replied to the letter of petitioners' counsel of January 17, 1966, stating that State Farm had checked into the situation and that "we feel that this matter is closed and requires no further action".

On February 4, 1966 petitioners' counsel wrote a letter to State Farm making claim for payment under the uninsured motorist policy clause; and on February 22, 1966 State Farm replied referencing Exclusion A of Insuring Agreement III, to the effect that an insured cannot without written consent of the company prosecute to judgment any action against any person who may be legally liable to the insured, and concluding: "therefore, we are unable to consider any coverage U payment in this claim". To this letter petitioners' counsel made letter reply on February 24, 1966, stating this belief that the exclusion clause referenced was void as against public policy and requesting action on the part of State Farm. State Farm replied to this letter on March 2, 1966 to the effect that because a default Judgment has been obtained this is not evidence that no insurance is involved, and requesting proof that coverage U, the uninsured motorist clause, is applicable to the case. Subsequently petitioners' counsel wrote to the Williams making inquiry as to whether either had insurance coverage, to which letter no reply was received.

On October 17, 1966 the action at bar was commenced in the United States District Court for declaratory judg-

ment as first hereinabove stated. Motion was made by State Farm to dismiss; and said Motion was denied by the court. Demand was made by State Farm for a jury trial incident to this declaratory Judgment action. At pre-trial hearing the letter correspondence between petitioners' counsel and State Farm, the petitioners' insurance policy, a certified copy of the default Judgment entered by the Mecosta County Michigan Circuit Court, and the entirety of State Farm's "raw file" were agreed to be admitted as exhibits; and it was further agreed that there be a jury trial to determine whether or not State Farm had or had not under the cirumstances waived its right to arbitration under the policy. The responsive pleadings of State Farm to the Complaint of petitioners were to the effect that State Farm had at all times been willing to arbitrate the claims of petitioners, had not waived its right to arbitration of such claims, and demanded that the court grant to State Farm the right to arbitrate such claims.

Subsequently there was a trial of the case to a jury on the limited issue of whether State Farm had or had not "waived" its right to arbitrate under the policy. At trial the case of petitioners was closed by their counsel on admission into evidence of the exhibits as agreed at pretrial hearing; and counsel for State Farm likewise closed proofs, whereby the case was submitted to the jury without the testimony of a witness being taken. The jury found for the petitioners; and Judgment was entered by the court pursuant thereto in favor of petitioners and against State Farm for the policy coverage limits, $20,000.00, plus interest from the date of the accident and costs (Appendix 1 annexed hereto). Motion for a Judgment notwithstanding the verdict was made by State Farm; and denied by Opinion and Order of the trial judge entered January 8, 1969. (Appendix 2).

Claim of Appeal was filed for State Farm timely after entry of Judgment in the District Court. Subsequently, and for reasons treated hereinafter not requiring iteration here, a Motion was filed for petitioners in the Circuit Court of Appeals, Sixth Circuit, for dismissal of the appeal of State Farm for failure of compliance with the Rules of Appellate Procedure. This Motion was "passed to the trial" by the said appellate court; but the majority Opinion

in appellate decision failed to include any decision of said Motion, and totally elided same.

Petition for Rehearing and Suggestion for Rehearing En Banc was filed in said Court of Appeals on behalf of petitioners; but same was received in said Court by the Clerk thereof several days after expiration of 14 days from and after the date of entry of Judgment by said appellate court. A Motion was then made in said court for an extension of time for the filing of said Petition and Suggestion; and such Motion was denied by Order of said Court of Appeals entered March 6, 1970 (Appendix 4 annexed hereto).

REASONS FOR GRANTING THE WRIT

1. The Motion of Petitioner timely made to dismiss the appeal was "passed to the trial" by the United States Court of Appeals for the Sixth Circuit; but said Court failed to decide such Motion in Opinion and Judgment (Appendix 3).

2. The decision of said Court of Appeals contravenes long-established settled Michigan law and reverses a consistently uniform line of Michigan Supreme Court cases citing back to 1917 and culminating in 1967; and likewise reverses a Michigan Court of Appeals case consistent therewith and directly in point with the case at bar decided in December, 1969.

3. The pivotal point and primary premise of said Court of Appeals Opinion and Judgment, viz: that respondent here had but "three days" to react to the notice by petitioners that they were prosecuting to judgment (Appendix 3, p. 31 note 5) is fallacious, as respondent in fact had 3 days plus 20 additional days to intervene and appeal, should it elect this procedure, and 3 days plus 4 months after such notice to intervene and move to set aside the Riley default judgment under applicable Michigan General Court Rules (Appendix 2, GCR 209, 803.2, 420.4 cited by Opinion of trial court).

4. The jury-found waiver of arbitration made the exclusion clause (Insuring Agreement III (a), Appendix 3, p. 29) inoperative as such clause was merely ancillary to and an adjunct of the arbitration process.

5. The exclusion clause referenced in 4 above is void as against public policy and, being in general nationwide use, should be so held by this court at earliest opportunity.

6. It is plainly apparent from the face of the Exhibits that reasonable minds could differ on the question of waiver of arbitration by respondent's statements in letters to petitioners' counsel that it considered the matter "closed and requires no further action" and that it was "unable to consider any coverage U payment" (Appendix 3, p. 35, dissent of Celebrezze, Circuit Judge), whereby it was gross error for the Circuit Court of Appeals for the Sixth Circuit to by 2 to 1 decision mandate the setting aside of the jury verdict and the dismissal of petitioners' Complaint, especially since the action was initially for declaratory judgment and such mandate is unconscionably harsh and an injustice to petitioners by reason of the interim time factor which bars petitioners from redress other than in this Court.

I. THE MOTION

Petitioners timely filed a Motion to Dismiss the appeal in the Court of Appeals, Sixth Circuit, on the ground that Rule 10(b) of said Court had not been complied with by respondent, nor had Rule 11(c) and its requirement of compliance with Rule 12(a) of the Rules of Appellate Procedure. This Motion and a supporting Affidavit further set forth that respondent had procured, ex parte, an Order of the District Court extending for 90 days the time for transmittal by the Clerk of the District Court of the record on appeal to the Clerk of the Court of Appeals, without giving notice as to same of any kind to counsel for petitioners either before, at or after the fact. Rule 11(c) requires that where the record is retained in the District Court under such an Order the appellant shall nevertheless cause the appeal to be docketed in the Court of Appeals and shall file a "partial record" in that court. This rule provision, by use of the word "shall' is mandatory. It was not complied with. There were no Stipulations of any kind, nor Order of any court waiving rule compliance. It is the announced policy of said Court of Appeals that its time and

procedural rules are to be respected, complied with and enforced, with no variations permitted, by special notice of the Chief Judge. The Motion was meritorious. It was not decided, merely elided.

II. REVERSAL OF SETTLED, LONG-ESTABLISHED MICHIGAN LAW.

(In the interest of brevity the references hereinafter to "O-1" et al are to the Opinion of the United States Court of Appeals for the Sixth Circuit by the pages of same, reprinted as Appendix 3 attached hereto).

The dissenting Opinion of Honorable Anthony J. Celebrezze, Circuit Judge, accurately and pointedly sets forth the law of Michigan as enunciated in *Bielski vs. Wolverine Insurance Company*, 379 Michigan 280, 150 N.W. 2nd 788 (1967). The majority Opinion (O-7) states that reliance on this case was misplaced; and seeks to rationalize this conclusion by differentiation in factual genesis between *Bielski* and the case at bar. Such rationalization is unrealistic, as it is seldom if ever the situation that any two cases have absolute identity in factual and procedural posture. Such rationalization ignores the fact that in the *Bielski* case, citing long-established Michigan case precedent, the Michigan Supreme Court, as in most appellate cases, set forth the broad principles of Michigan law as quoted in the dissenting Opinion (O-11); and then applied these principles to the facts in that case. These same principles are equally applicable to the case at bar even though the genetic facts are not identical, and the procedural route to appellate review differs. If the majority decision is allowed to stand, its effect will be to reverse long-established Michigan law *as clearly demonstrated in the dissenting Opinion of Judge Celebrezze* (O-11, 12) *and the Michigan cases therein cited.*

This is further demonstrated by the case of *Kelley vs. Citizens Mutual Insurance Company, Court of Appeals of Michigan, 19 Mich. App. 177 (released for publication December 12, 1969) 172 N.W. 2nd. 537, holding (syllabus ¶2)*: "Automobile insurer which had refused to arbitrate according to policy and at all times had main-

tained that it was not liable under policy waived arbitration requirement *and exclusion clause in policy,* and insured's prosecution to judgment of his cause of action against uninsured motorist did *not* exclude him from coverage under policy". In the case at bar, as in *Kelly,* supra, the respondent consistently and throughout its correspondence denied any liability whatsoever under the uninsured motorist coverage of the policy, stating that the matter was "closed and requires no further action", and that it was "unable to consider any coverage U payment" (O-12 dissent); and the abrupt finality of these statements at the very least raised a jury question as to waiver, which the District Court jury properly decided in favor of Appellees. Long before the *Bielski* and *Kelley* cases supra, the Michigan Supreme Court in *Rorick vs. State Mutual Rodded Fire Insurance Company* 263 Michigan 169 (1933) held: "Defendant claims plaintiff was bound by the policy provisions as to arbitration. Defendant denied all liability. This excused plaintiff from arbitrating the dispute between them", citing *Blake vs. Insurance Company,* 194 Michigan 589 (1917). The genetic facts in all of these cases differ widely; but the principles of established law enunciated and applied therein do not differ and are equally applicable to the case at bar.

States other than Michigan have identical law. In *American Southern Insurance Company vs. Daniel,* 198 So. 2nd 850 (Fla. App. 1967) it is held that an insurer's denial of uninsured motorist coverage until after court action was instituted by the insured constituted waiver by the insurer of its right to arbitration.

III. PIVOTAL POINT OF DECISION FALLACIOUS

It is obvious from the majority Opinion that a deciding factor was the premise that defendant-appellant did not have the right to intervene in its own behalf in the case of plaintiffs-appellees against the Williams in the Mecosta County Michigan Circuit Court; and had no right to move to set aside the default Judgment against the Williams. This premise is fallacious. *Michigan General Court Rule, 209.1(3)* provides: "Anyone shall be permit-

ted to intervene in any action upon timely application when the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant may be bound by a judgment in the action;" and *Rule 209.2* as to permissive intervention provides: "Upon timely application anyone may be permitted to intervene in an action (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common". In *Michigan Court Rules Annotated, Honigman and Hawkins, 2nd Ed.* there are extensive annotations and comments, particularly in the 1969 Pocket Parts, which time and space limitations preclude being here set forth. It will be demonstrated, if certiorari is granted, that such annotations and case citations conclusively and most affirmatively show that defendant-appellant *could have intervened as of right* in Riley-Williams case; and, moreover, could have done so as of right with its status as an insurance company undisclosed should a jury trial have been involved. These annotations and comments further affirmatively show that defendant-appellant *could have intervened* at any time within *four months* after the Default Judgment was entered in said case, as such time period is provided by *Michigan General Court Rule 520.4* where personal service was made upon the party against whom the default was taken, as was the situation in the Riley-Williams case. The majority Opinion in the case at bar (O-8, Footnote 5) indicates that same was further premised upon the erroneous assumption that defendant-appellant had only *three days* time within which to react to the notice that plaintiff-appellees were prosecuting to judgment their action against the Williams in the Mecosta County Michigan Circuit Court. It is clear from the above-quoted Rule provisions that defendant-appellant had in fact *three days plus four additional months* in which to react to the notice.

On the right to intervene in an action by the insured against an uninsured motorist *all cited cases* in *95ALR 2nd 1330* hold the insurer has a right to intervene; and in the *Later Case Service*, citing cases to the same effect, it is interesting to note that respondent here was a party to 3 of same, i. e. *State Farm vs. Glover*, 113 Ga. App. 815, 149 SE 2nd 852, *State Farm vs. Brown*, 114 Ga. App. 650,

152 SE 2nd 641, and *State Farm vs. Giles,* 115 Ga. App. 193, 154 SE 2nd 286.

IV. THE EXCLUSION CLAUSE

The exclusion clause (O-6) requiring consent of the insurer in writing before the insured may prosecute to judgment any action against anyone legally liable to the insured is ancillary to and merely an adjunct of the arbitration process; and the jury-found waiver of the latter in the case at bar waived such clause. This is held right in point by the *Kelley* case, supra, cited and quoted in II hereinabove; and this is the law of Michigan, following a long line of Michigan precedent. It was error for the majority in the Circuit Court of Appeals to invoke this clause to literally throw petitioners out of court without remedy or redress by mandating their Complaint be dismissed. This is more forcefully apparent when it is considered that the action was one for declaratory judgment — in short, guidance — in the face of respondent's repeated denials of any liability (O-12). Such decision is harsh, unjust and unconscionable; and diametrically opposite to settled Michigan law.

As analogous to the case at bar, and citing public policy by legislative enactment in Illinois (as in Michigan) to attempt to protect individuals from injuries and death as the result of collisions with uninsured motorists, the case of *Andeen vs. Country Mutual Insurance Company,* 217 N.E. 2nd 814, 818 (Ill. App. 1966) includes comment by the court: "The company had every opportunity to defend the suit if it desired to do so, or to demand arbitration if that is what is desired. *The company did nothing.* It did not ask for arbitration nor did it defend the suit against the uninsured motorist. It cannot take advantage of its own failure to act in order to avoid liability under the contract of insurance"; and in *Bowsher vs. State Farm Fire and Casualty Company,* 419 Pacific Second 606 (1966), the court held that the legislative intent to provide protection as to uninsured motorist "should be liberally construed to the end that persons injured by uninsured motorists be protected to the limits of such policies to the same

extent that they would have been protected if the tort feasors had carried insurance". Of further significance and import to the case at bar is *Mutual Insurance Company vs. Lovins,* 248 Fed. Supp. 108 (1965), collecting and reviewing numerous prior leading cases involving uninsured motorists clauses, holding that the policy clause requiring written consent of the insurance carrier before instituting action against alleged tort feasors was void as against public policy. In this connction the question presents itself: would any insurance carrier be likely to grant its consent in writing for its insured to sue alleged tort feasors where the damages suffered by its insured and the factual posture of the situation would in effect make such written consent tantamount to an acknowledgement that the carrier was liable in the full amount of its policy limits?

V. EXCLUSION CLAUSE VOID AS AGAINST PUBLIC POLICY

The *Mutual Insurance case, supra,* cited in IV hereinabove, squarely holds, collating all prior decisions, that a policy clause requiring written consent of the insurer before the insured may institute and prosecute to judgment a suit against alleged tortfeasors is void as against public policy. In *Lerma v. Allstate Ins. Co.,* 301 F. Supp. 361, N.D. Indiana (1968), it is stated:

> "The issues to be submitted to arbitration under this type of insurance contract encompass far more than the amount of damages to be covered. By its terms, the arbitration clause would require the parties to submit legal issues of liability on the contract to persons other than a court of competent jurisdiction. Even in those cases where the appellate courts have upheld arbitration, it has been directed solely to the amount of damages to be recovered. The futility of toothless arbitration is only enlightened by broadening the issues to be determined."

In the same context in *Western Casualty and Surety Company v. Strange*, 3 Mich. App. 733 (1966), an insurer's action for declaration of rights, with the *insurer* claiming certain issues, coverage and contract interpretation, were for court determination and not arbitration, the court, stating that the Michigan Supreme Court had not passed on the question and citing cases from other states, held 2 or 3 enumerated issues were for arbitration, but the other was not, and was remanded for lower court determination. The policy provisions in this case were in substance identical to those in the case at bar.

Due to the confusion in this area it seems imperative that this court pass upon the question of the exclusionary clause being void as against public policy at earliest opportunity, if a situation of chaos and a great multiplicity of state and federal actions is to be avoided. All policies of automobile insurers, nationwide, contain identical or virtually identical "uninsured motorist" clauses, which include "arbitration" clauses, and "exclusionary" clauses as to which the case at bar is typical and an excellent example. The expression of this court at this time on the question in this case will eliminate very foreseeably the present and future massive duplication of litigation burdening lower court calendars, federal and state, involving this same issue. A mere reading of the entirety of the uninsured motorist coverage provisions of any typical automobile policy will clearly reveal the inconsistencies between the insuring and exclusionary provisions and be persuasive that the public policy aspect be determined by this court with minimum possible delay.

VI. REASONABLE MINDS COULD DIFFER

On this issue the dissenting Opinion of Celebrezze, Circuit Judge, being most brief and concise, is adopted here (O-11, 12 Appendix 3). Counsel could not say better. This should have been the mandate of the Court of Appeals, Sixth Circuit.

CONCLUSION

The majority Opinion and Judgment of the Court of Appeals for the Sixth Circuit in this case erroneously interprets controlling Michigan law. Its basic premise is fallacious. A public policy question is involved which should be expeditiously resolved in this court on a matter of nationwide concern. The interests of an overwhelming majority of the citizens of the entire United States, all automobile owners and drivers, are directly involved. The dissenting Opinion is an accurate interpretation of Michigan law. The majority Opinion reverses and contravenes settled Michigan law. On these grounds it is urged that the Petition be granted.

Respectfully submitted this 24th day of April, 1970.

R. L. Miles
Attorney for Petitioners.

110½ North Michigan Avenue
Big Rapids, Michigan 49307

APPENDIX 1

JUDGMENT OF THE TRIAL COURT
(Filed October 23, 1968)

This action came on for trial before the Court and a jury, Honorable NOEL P. FOX, United States District Judge, presiding, and the issues have been duly tried and the jury having duly rendered its verdict, in favor of the plaintiffs,

It is Ordered and Adjudged that the plaintiffs George W. Riley and Goldie I. Riley recover of the defendant State Farm Mutual Automobile Insurance Company the sum of $20,000.00 with interest thereon at the rate as provided by law from December 12, 1963 and their costs of action.

Dated at Grand Rapids, Mich., this 23rd day of October, 1968.

Howard T. Ziel
Clerk of Court

(s) Arthur C. Langeveld
By Deputy Clerk

APPENDIX 2

OPINION AND ORDER OF THE TRIAL COURT DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT
(Filed January 8, 1969)

This court has before it a motion for a directed verdict of no cause of action pursuant to Rule 50 of the Federal Rules of Civil Procedure. This motion was made by defendant at the close of proofs by both parties in a jury trial.

All of the evidence in this trial was presented by the plaintiff and both parties rest on such proofs which include the following:

(1) An automobile policy issued by defendant State Farm Mutual Insurance Company to plaintiff George W. Riley.

(2) A letter dated January 17, 1966, from plaintiff's attorney, Robert L. Miles, to Mr. Don Saum, the agent through whom the policy in question was issued.

(3) A conformed copy of a default judgment in favor of the plaintiffs herein against James and Dennis Williams granted by the Mecosta County Circuit Court on January 21, 1966.

(4) A second letter from attorney Miles to agent Saum dated February 4, 1966.

(5) A letter dated February 9, 1966, from claim superintendent Robert A. Hitchmough to attorney Miles.

(6) Another letter dated February 22, 1966, from claim superintendent Hitchmough to attorney Miles.

(7) A third letter dated February 24, 1966, from attorney Miles to claim superintendent Hitchmough.

(8) A fourth and final letter from claim superintendent Hitchmough to attorney Miles dated March 2, 1966.

This action was precipitated, in part, by a three-car collision involving the plaintiffs, who were seriously injured.

Plaintiffs allege that prior to commencing suit in Mecosta County, Mr. Riley had inquired of State Farm whether or not they intended to bring suit against James, owner, and Dennis Williams, driver, of one of the other two cars involved in the collision. State Farm, however, denies such knowledge.

On November 26, 1965, plaintiffs filed suit in Mecosta County against the two Williamses. A default judgment in the sum of $150,000 was entered January 20, 1966, and a conformed copy sent by attorney Miles to agent Saum with the February 4 letter, which included a demand for payment under the uninsured motorist clause of State Farm's policy.

The *sole* issue, as acknowledged by defendant's attorney, (Tr. 2), was whether State Farm had waived the right to demand arbitration pursuant to the terms of its insurance contract with Mr. Riley.

The uninsured automobile coverage, or Coverage U, is as follows:

> "COVERAGE U — Damages for Bodily Injury Caused by Uninsured Automobiles. To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration."

However, the policy provides for arbitration upon the written demand of either party and provides in pertinent part:

> "15. Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount payable hereunder, then each party shall, upon written demand of either, select a competent nad disinterested arbitrator."

The only defense raised by State Farm at trial so far is the allegation that it had not waived its right to demand arbitration pursuant to paragraph 15 and that it was and remains ready to enter into arbitration. However, there is no evidence of a written demand as the policy requires and all proofs have now been submitted. The clause should be strictly construed for two reasons. First, it is generally

accepted, but for statutory provisions, arbitration is contrary to public policy because it ousts the courts of jurisdiction. Second, it is wholly for the benefit of the insurer. Bielski v. Wolverine Ins. Co., 379 Mich. 280, 286, 150 N.W. 2d 788, 790 (1967).

The sole issue on this motion for directed verdict may be framed as follows:

> WHETHER THERE IS SUBSTANTIVE EVIDENCE SUFFICIENT TO PERMIT A FINDING BY THE JURY THAT DEFENDANT, THROUGH THE WORDS AND ACTIONS OF ITS DULY AUTHORIZED EMPLOYEES, WAIVED THE RIGHT TO DEMAND ARBITRATION OF PLAINTIFF'S CLAIM.

The test to be applied in determining whether or not the motion should be granted was set forth by the Sixth Circuit in Lovas v. General Motors Corp., 212 F.2d 805, 807 (1954):

> "In considering a motion by the defendant for a directed verdict the Court assumes the truth of the evidence in support of the facts essential to the plaintiff's claim together with all the inferences that justifiably could be drawn therefrom. Where such evidence on an issue is so overwhelmingly against the plaintiff's contention as to leave no room to doubt that a fact is not what the plaintiff claims it to be and such fact is essential to plaintiff's cause of action, the Court is authorized as a matter of law to direct a verdict for the defendant. But where uncertainty as to the facts arises from a conflict in the testimony, or because fairminded men will honestly draw different conclusions from undisputed facts, the question is not one of law but of fact to be settled by the jury."

Before deciding the question as regards the disposition of this motion, the court will discuss two objections by defendant to the admission and non-admission of certain evidence.

Counsel for defendant sought to offer evidence as to State Farm's evaluation of the three-car collision and its reason for denying liability (Tr. 3).

Evidence having no bearing on the matters in issue should be excluded, and a "trial judge has discretion to exclude evidence which is only slightly probative if its introduction would confuse and mislead the jury by focusing its attention on collateral issues and if it would unnecessarily delay the trial," United States v. Bowe, 360 F.2d 1, 15 (2nd Cir. 1966).

That the evidence defendant sought to have admitted was properly excluded is supported by a reading of the definition of waiver. The Michigan Supreme Court has defined the term as "the intentional relinquishment of a known right. It implies an election to forego some known advantage which might have been insisted upon, * * * which induced a belief of an 'intention and purpose to waive.' " Couper v. Metropolitan Life Ins. Co., 250 Mich. 540, 544-45, 230 N.W. 929, 931 (1930). In order for evidence to be admissible as to a question of waiver, the evidence must be relative to one of the essential elements of waiver, viz., the existence of a right, benefit, or advantage; knowledge of such right, benefit or advantage; and inducement of a belief of an intention to relinquish the same.

The evidence sought to be admitted has little or no relevancy to the issue of waiver. The determination by State Farm of which party or parties were at fault in the collision does not affect a legal determination of liability and does not tend to prove whether or not the defendant intended to waive arbitration. The evidence, at most, could possibly have demonstrated the *motive* for defendant's conduct. However, motive is not an issue. Why defendant acted as it did is not relevant to whether or not defendant's actions constituted an intentional relinquishment of its right to demand arbitration. Furthermore, introduction of evidence as to whom State Farm considered to be at fault would only "confuse and mislead the jury by focusing its attention on collateral issues" not before them. Bowe, supra. The trial judge has broad discretion to admit or exclude evidence. The evidence sought to be introduced would have been

irrelevant, and possibly prejudicial or confusing to the jury.

Counsel for defendant also objected to the introduction of any letters between State Farm and attorney Miles which were written after the default judgment was entered on January 20, 1966. The objection was overruled.

The issue is whether or not defendant has at any time waived its right to demand arbitration. If that right has not been waived, then defendant could make a proper demand and preclude any judgment by this court other than the determination that defendant had not waived its right to arbitration. On the narrow issue now before the court, whether the acts constituting a waiver occurred before or after January 20, 1966, is of no consequence. The only factual issue for the jury to determine is whether the defendant waived arbitration and not when. Therefore, the letters written after January 20, 1966 are admissable.

In order to decide the motion for a directed verdict, the court must determine whether there is sufficient substantive evidence to support a finding by the jury that the right to demand arbitration had been waived.

As to the existence of a right to demand arbitration, there is no dispute. Nor is there any dispute that State Farm, author of the clause, knew of the existence of the right. Therefore, the only factual issue for the jury is whether or not the words and conduct of various State Farm employees constituted a valid waiver of the right to demand arbitration which induced the Rileys to believe that such waiver had occurred.

The Michigan Supreme Court has held that a failure to cooperation with a claimant who demanded arbitration, a six month delay of an arbitration award, and a denial of all liability are all acts sufficient to constitute a waiver. Bielski v. Wolverine Ins. Co., 379 Mich. 280, 150 N.W.2d 788 (1967); Shapiro v. Patron's Mut. Fire Ins. Co., 219 Mich. 581, 189 N.W. 202 (1922); Rorick v. State Mut. Rodded Fire Ins. Co., 263 Mich. 169, 248 N.W. 584 (1933). Other state decisions to the same effect are Levy v. American Auto. Ins. Co., 31 Ill. App.2d 40, 175 N.E.2d 607 (1961), and Kirouac v. Haley, 104 N.H. 157, 181 A.2d 634 (1962).

As the court said in Rorich, supra, at 171, 248 N.W. at 585:

> "Defendant claims plaintiff was bound by the policy provisions as to arbitration. Defendant denied all liability. This excused plaintiff from arbitrating the dispute between them. Blake v. Insurance Co., 194 Mich. 589, 161 N.W. 890."

This court finds that there is sufficient evidence to submit the case to the jury. There is sufficient substantive evidence to permit the jury to find an intention to relinquish the waiver provision because of an unreasonable delay and a denial of all liability.

Agent Saum was sent a copy of the summons and complaint filed in Mecosta County on January 17, 1966. Pursuant to Michigan General Court Rule 209, State Farm could have intervened as of right in the Mecosta County action before a default judgment was entered three days later. After January 20, 1966, State Farm also had twenty days in which to intervene and appeal the decision to the Michigan Court of Appeals (General Court Rule 803.2), or move within four months to have the judgment set aside (General Court Rule 420.4). However, defendant did not choose to pursue any of these alternatives.

Even though a formal claim was not made until February 4, 1966, State Farm had knowledge of and could have intervened unilaterally in the Mecosta County action as of January 17, 1966. And with this prior knowledge, it still had six days to perfect an appeal and three and one-half months to have the judgment set aside after a claim was technically filed.

The jury could also find from several letters sent to attorney Miles that State Farm waived its right to demand arbitration by denying all liability. Claim superintendent Hitchmough concluded his February 9 letter (five days after a claim was filed) to attorney Miles with the sentence: "We feel that this matter is closed and requires no further action." He also concluded his February 22 letter thus: "Therefore, we are unable to consider any coverage U payment in this claim." Although Mr. Hitch-

mough stated in his letter of March 2 that he would "look further into this matter" if attorney Miles would furnish "some proof that coverage U is applicable . . .," this would only demonstrate the need for a factual determination by the jury concerning an intention to waive. There is clearly evidence sufficient to permit the jury to find that State Farm led the Rileys to believe that it had waived its right to demand arbitration.

The motion by defendant for a directed verdict is denied.

IT IS SO ORDERED.

Dated: January 8, 1969.

Noel P. Fox
District Judge.

APPENDIX 3

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(Filed Jan. 28, 1970)

No. 19332

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

George W. Riley and Goldie I. Riley,
Plaintiffs-Appellees,

v.

State Farm Mutual Automobile Insurance Company,
Defendant-Appellant.

Appeal from United States District Court for the Western District of Michigan, Southern Division.

Decided January 28, 1970.

Before WEICK, CELEBREZZE and MCCREE, Circuit Judges.

WEICK, Circuit Judge. This action was brought in the District Court to recover an amount claimed to be due Rileys under an uninsured automobile clause contained in a liability insurance policy issued by State Farm Mutual Automobile Insurance Company (State Farm) to its insured, George W. Riley. Jurisdiction was based on diversity of citizenship.

The case was tried to a jury resulting in a verdict and judgment in favor of the Rileys in the amount of $20,000, which was the full amount of coverage provided in the insurance policy for injuries to the insured caused by an uninsured automobile. State Farm has appealed to this Court.

The claim arose from an accident which took place on December 12, 1963. Mr. Riley was driving his automobile, in which his wife, Goldie, was riding as a passenger. The

Riley car collided with a truck operated by one Williams, at a street intersection protected by overhead traffic signal lights.

State Farm investigated the accident and determined that it resulted from the negligence of its insured, Riley, in operating his automobile through the intersection when the signal light was red. State Farm then settled a claim for damages asserted by Williams against Riley.

Nearly two years later, namely on November 26, 1965, the Rileys, without the knowledge of State Farm, filed suit against Williams in the Circuit Court of Mecosta County, Michigan, to recover damages for personal injuries alleged to have been sustained by them in said accident. Williams apparently carried no liability insurance on this truck.[1]

On January 17, 1966, the Rileys' attorney wrote a letter to State Farm's local agent in Big Rapids, Michigan, enclosing a copy of the summons and complaint in said Circuit Court action and stated that he intended to take a default judgment against Williams on January 20, 1966 (three days later), if no responsive pleading was filed. The attorney also claimed that State Farm "must have been under a gross misconception of the accident facts" when it paid its money in settlement of the claims asserted by Williams against Riley.

On January 20, Rileys obtained a default judgment against Williams in the amount of $156,000 in the action in the Circuit Court. On February 4, their attorney again wrote to agent Saum, enclosing a copy of the default judgment. Claim and demand for coverage under the uninsured automobile clause of the policy was made for the first time.

On February 9, State Farm replied to the attorney's letter of January 17, as follows:

> "Your letter to Mr. Saum [the local agent] indicating that we fouled up the handling of the claim has

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1 Although the record does not reveal any stipulation to the fact that Williams was uninsured, this fact was apparently not disputed at the trial.

been forwarded to me. It has never been our impression that you thought that we paid claims that we didn't owe but rather vice versa. However, we appreciate your concern about our money and have checked into the situation further. We feel that this matter is closed and requires no further action."

On February 22, State Farm replied to the attorney's letter of February 4:

"Your letter of February 4, 1966 making claim under Coverage U of Mr. Riley's policy has been forwarded to me.

"Under the Insuring Agreement III, Exclusion A states in brief that a person entitled to this coverage cannot without written consent of the company, prosecute to judgment any action against any person who may be legally liable to the person.

"Therefore, we are unable to consider any coverage U payment in this claim."

Rileys' attorney responded to State Farm's letter of February 22 on February 24. He stated that he believed that the exclusion clause was void as against public policy and he requested action on the part of State Farm. State Farm replied on March 2:

"Thank you for your letter citing some cases in your favor. It appears that your position is that the way our policy is written is against public policy and thus unenforceable.

"While I disagree with this I think before we take the matter any further we should have some evidence that there is not any insurance involved in this case. It appears that merely because a default judgment has been obtained that this is not evidence that no insurance is involved.

> "Please furnish us with some proof that coverage U is applicable to this case and I will then look further into the matter."

Subsequently, the Rileys' attorney wrote to Williams asking whether he had insurance coverage. No reply was received. Thereafter, on October 17, 1966, the present action was instituted in the District Court.

State Farm filed a motion to dismiss on the ground that the policy provided for an exclusive remedy of arbitration. The insuring agreement provided:

> ". . . [F]or the purposes of this coverage, determination as to whether the insured . . . is legally entitled to recover such damages [against the uninsured motorist], and if so the amount thereof, shall be made by agreement between the insured . . . and the company or, if they fail to agree, by arbitration."

The arbitration clause is set forth in the margin,[2]

The District Judge denied the motion to dismiss. His views on the subject of arbitration are best stated in his opinion denying the motion. They are as follows:

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2 "15 ARBITRATION. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount payable hereunder, then each party shall, upon written demand of either, select a competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator, or if unable to agree thereon within 30 days, then upon request of the insured or the company such third arbitrator shall be selected by a judge of a court of record in the county and state in which such arbitration is pending. The arbitrators shall then hear and determine the question or questions so in dispute, and the decision in writing of any two arbitrators shall be binding upon the insured and the company, each of whom shall pay his or its chosen arbitrator and shall bear equally the expense of the third arbitrator and all other expenses of the arbitration. Unless the parties otherwise agree, the arbitration shall be conducted in the county and state in which the insured resides and in accordance with the usual rules governing procedure and admission of evidence in courts of law."

> "The [arbitration] clause about which we are speaking today certainly was put in the contract by the insurance company; they are scribners. And they did it after considerable experience and consultation and not for the benefit of the insured but primarily as an impediment to keep the insured from getting into court on the merits of the issues involved.
>
> "It is intended as another defense to the ultimate obligation of paying, wearing out the insured. It should be strictly construed, and anything that could be construed as a waiver should be accepted as a waiver."

These views are only partially correct. It is apparently the law of Michigan that arbitration clauses are "inserted wholly for the benefit of the insurer." *Bielski* v. *Wolverine Ins. Co.*, 379 Mich. 280, 286 (1967), citing 29A Am. Jur., *Insurance* § 1617. However, in the portion of the District Judge's opinion quoted above is the mistaken assumption which he made explicit in his opinion denying the defendant's motion for a directed verdict. He stated:

> ". . . [I]t is generally accepted, but for statutory provisions, arbitration is contrary to public policy because it ousts the courts of jurisdiction."

Regardless of the law of other states, decisions of the Supreme Court of Michigan have long favored settlement of disputes by arbitration. *Alpena Lumber Co.* v. *Fletcher*, 48 Mich. 555 (1882); *Chicago & M.L.S. R.R. Co.* v. *Hughes*, 28 Mich. 186 (1873). *Accord*, Mich. Stat. Ann. §§ 27A. 5001-5025. See also *Van Horn* v. *State Farm Mutual Auto. Ins. Co.*, 391 F.2d 910 (6th Cir. 1968); *Norton* v. *Allstate Ins. Co.*, 226 F.Supp. 373 (E.D.Mich. 1964).

The fact that an arbitration clause is inserted for the benefit of the insurer does not give it a sinister purpose. In these days of congested court calendars, arbitration may be a more expedient method of settlement of claims for both

the insurance company and the insured. Additionally, arbitration may be the only truly appropriate method to determine liability of an uninsured motorist to the insured. If suit is filed by the insured against the uninsured motorist, the insurance company, which may be held liable ultimately, is placed in a very difficult position. Having no contractual relationship with the uninsured motorist, it cannot represent him without his consent. We doubt that an insurance company has an absolute right to intervene in an action against an uninsured motorist without his consent. In fact, it is conceivable that such an intervention could work to the prejudice of the uninsured motorist. If the insurance company is unable to intervene, ultimately it may be held liable without having had an opportunity to protect its interest.

Nor do we find anything illegal in the following exclusionary provision of the policy:

> "Exclusions — Insuring Agreement III
>
> "Insuring Agreement III does not apply:
>
> (a) to bodily injury to an insured, or care or loss of services recoverable by an insured, with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall without written consent of the company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefore; . . . ."

Without such a provision the insured could do exactly what he did here, namely, file suit, obtain a default judgment against a person whom the insurer had no right to defend, and claim the judgment as binding on the insurance company on the ground of res judicata.

At the close of plaintiffs' evidence, State Farm moved for a directed verdict, which the Court denied, and the case was submitted to the jury on the single issue of whether

State Farm waived the arbitration provision in the insurance policy. In so submitting the case the District Court erred as there was not substantial evidence to prove any waiver. There was no evidence that Rileys ever made a request or demand for arbitration.[3]

The insurer was entitled to have determined by arbitration the issue of the liability of the uninsured motorist to the insured. *Cf. Rogers* v. *United Serv. Auto. Ass'n*, 410 F.2d 598 (6th Cir. 1969).

The District Court, in submitting to the jury the issue of waiver, relied on *Bielski* v. *Wolverine Ins. Co., supra.* In our opinion reliance on this case was misplaced. *Bielski* involved a ruling on a motion for summary judgment where "every well pleaded allegation in the complaint is assumed to be true," 379 Mich. at 283. The complaint had alleged a demand for payment of the policy benefits on the day of the accident, and when this was refused,

> ". . . [P]laintiff did on numerous occasions demand that the matter be submitted to arbitration and defendant continually refused to enter into arbitration or

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3 Accepting as the law of Michigan that arbitration clauses are inserted wholly for the protection of the insurer, it does not follow necessarily that it is the duty only of the insurer to demand arbitration. The insurance contract clearly states that in the event of disagreement between the parties, arbitration shall ensue "upon the written demand of either . . . ." This provision binds both parties equally. Responsibility for demanding arbitration could have been placed solely with either party and such a provision would have been enforceable according to its terms. *Blake v. Farmers' Mutual Lightning Protection Fire Ins. Co. of Mich.*, 194 Mich. 589, 593-594 (1917) (duty of insurer); *Norton v. Allstate Ins. Co.*, 226 F.Supp. 373, 374 (E.D.Mich. 1964) (duty of insured). Even if the contract had placed that duty solely with the insurance company, it seems almost too obvious to comment that in order to bring him into play a requirement to demand arbitration, the company must be made aware that there exists a dispute which would be the proper subject of arbitration. State Farm was not notified of a dispute until three days prior to entering the default judgment in the Mecosta County Circuit Court. This was inadequate notice. There was no waiver of "exclusion (a)" of the policy or estoppel to assert the same as a defense. *Naparstek v. Citizens Mut. Ins. Co.*, ___ Mich. App. ___, No. 5328, decided August 27, 1969.

to co-operate with plaintiff so that arbitration could be had."

Bielski held that these allegations, if true, required submission to the jury of the issue of waiver of arbitration, and that the trial court erred in granting summary judgment.

Kelley v. *Citizens Mut. Ins. Co.*, ... Mich. App. ....., (1969), 172 N.W.2d 537, held that the insurer waived arbitration when it admitted in its answers that it had refused to arbitrate and claimed it was not liable under the policy.

In the present case, no claim was made for policy benefits until more than two years after the accident occurred. Rileys made no request or demand for arbitration at any time. Instead, they filed suit in the Circuit Court against Williams, and, in violation of the provision of the policy, proceeded to take a default judgment against Williams, giving State Farm only three days' notice of their intention to do so.

We disagree with the District Judge that the failure of the company to intervene in the Circuit Court action or to move to set aside the default judgment against Williams, is any evidence of waiver of arbitration. As we have previously pointed out, the company had no right to represent Williams in the Circuit Court and had no right to move to set aside the default judgment against him. We also question its right to intervene on its own behalf.[4]

Rileys came within exclusion (a) of the policy by prosecuting to judgment the claim against Williams without the consent of State Farm.[5] Because of the operation of exclusion (a), State Farm was completely relieved of any liability under coverage U of the policy. Therefore, regardless of the outcome of the action in the Mecosta County Cir-

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4 The District Judge relied on Michigan General Court Rules of 1963, Rule 209, Rule 520.4 and Rule 803.2.

5 Three days was not sufficient time within which to react to Rileys' notice that they were prosecuting to judgment.

cuit Court, State Farm had no right to intervene since it was not a party in interest.

State Farm did not delay arbitration. No request therefor had been made by plaintiffs; see footnote 3, *supra*. The delay was on the part of plaintiffs, who made no claim for policy benefits under the uninsured automobile clause until more than two years after the accident. In fact, the only action taken by State Farm prior to its being notified of the action in the Circuit Court, was its settlement with Williams. Settlement alone is not sufficient basis from which to infer a waiver.[6]

The correspondence between the parties, in our judgment, did not constitute a waiver of arbitration. At no time did Rileys make a request for arbitration. Nor did State Farm deny at any time that its policy provided uninsured automobile coverage. *Rorick* v. *State Mut. Rodded Fire Ins. Co.*, 236 Mich. 899 (1933), on which the District Court relied, may be distinguished on the ground that in *Rorick* the company denied the existence of a contract between itself and the insured.

We interpret the letters of the company merely as declining to pay policy benefits on the ground that there was no legal liability therefor. In its first letter, which was two years after the accident and after it had made payment of the claim of Williams against Riley, it stated:

> "We feel that this matter is closed and requires no further action."

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6 To hold that settlement of a claim against the insured without more could constitute a waiver of arbitration, would be to set at loggerheads two policies of the state of Michigan. As has been noted, Michigan encourages the resolution of disputes by arbitration. At the same time, the law in Michigan is that a liability insurer has a good faith duty to settle claims against its insured. *City of Wakefield v. Globe Indem. Co.*, 246 Mich. 645 (1929). *Cf. Omscolite Corp. v. Federal Ins. Co.*, 374 Mich. 344, 347 (1965); *Jackson v. St. Paul-Mercury Indem. Co.*, 339 F.2d 40, 44 (6th Cir. 1964). Therefore, unless the insured resists attempts to settle, the insurer is duty bound to settle a claim which its investigation shows is meritorious.

In its second letter, which was written after it had been advised of the default judgment, it called attention to the fact that the insured had violated the policy provisions by proceeding to judgment in the Circuit Court without the written consent of the company and, therefore, it could not consider payment. In its last letter, on March 2, it disagreed with the contention of the Rileys' attorney that the policy provision was illegal, and stated:

> "... [W]e should have some evidence that there is not any insurance involved in this case. It appears that merely because a default judgment has been obtained that this is not evidence that no insurance is involved.
>
> "Please furnish us with some proof that coverage U is applicable to this case and I will look further into the matter."

This last comunication is hardly a repudiation of its contractual liability. The attorney for plaintiffs responded by filing the complaint in the present case.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

CELEBREZZE, Circuit Judge. Dissenting. The sole issue in this case is whether the Appellant, by its conduct, impliedly waived its right to arbitrate a dispute arising under an uninsured motorist endorsement in its policy with the Appellees. The majority apparently holds that reasonable minds could not reasonably differ that the Appellant did not waive arbitration. I respectfully disagree.

The Michigan Supreme Court has held that where arbitration is involved, waiver need not be shown to have been expressly made, but may be implied from the conduct of an insurer. *Bielski v. Wolverine Ins. Co.*, 379 Mich. 280, 150 N.W.2d 788 (1967). In *Bielski*, which was that court's most recent pronouncement on this issue, the Michigan Supreme Court quoted the following statements with approval:

> " 'A clause in an insurance policy providing for arbitration or appraisal of the loss or damage as a condition precedent to a suit by the policy holder to recover insurance is inserted wholly for the protection of the insurer and may be waived by it. Such waivers need not be expressed in terms, but may be implied by the acts, omissions, or conduct of the insurer or its agents authorized in such respect.' 29A Am. Jur., Insurance, § 1617, p. 703."
>
> " 'The insurer, once having waived the right to demand arbitration of the loss under the terms of the policy, cannot require that the matter in dispute be submitted to arbitrators.' 29A Am. Jur., Insurance, § 1617, p. 704." 379 Mich. *at* 286, 150 N.W.2d *at* 790.

The policy enunciated in *Bielski*, and in other Michigan cases, is that where insurers recognize the existence or arbitrable disputes, they have the duty to go forward with, or expedite, arbitration. Where they fail to do so, they waive their right to arbitrate. This policy stems from several entrenched principles of insurance law. First, insurers, which profit off their investments, benefit from delays in the reso-

lution of conflicts, at the expense of their insureds. *See Shapiro v. Patrons' Mutual Fire Ins. Co.*, 219 Mich. 581, 189 N.W. 202, 203 (1922). Since delay benefits the insurer, it should not be encouraged to sit on the procedures it writes into its contract for its benefit until its insured exercises them for it. Second, this policy arises from the long-recognized duty of insurance companies to cooperate with their insureds. *See, e.g., Gaunt v. John Hancock Mutual Life Ins. Co.*, 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849. The third principle underlying this policy is the canon *contra proferentem*, which is applied with particular force to insurance contracts generally. *See, e.g., McNally v. American States Ins. Co.*, 308 F.2d 438, 444 (6th Cir. 1962) (applying Michigan law).

I believe that the Appellant's letters of February 9 and 22 at least raised a jury question as to waiver, which the jury properly decided in favor of the Appellees. Those letters indicate beyond a doubt that the Appellant knew there was a genuine, arbitrable dispute. Yet, neither letter mentioned arbitration. Neither intimated that the Appellant was considering arbitration; neither suggested the Appellees request arbitration pursuant to Clause 15. One indicated that the Appellant considered the matter "closed and requires no further action"; the other that the Appellant was "unable to consider any coverage U payment." The abrupt, final tone of these letters suggests they were calculated to delay or avoid payment. They certainly breached the Appellant's "duty to cooperate" towards a "reasonably speedy determination of liability." *Shapiro v. Parsons' Mutual Fire Ins. Co.*, 219 Mich. 581, 189 N.W. 202, 203 (1922).

In view of my feeling that those two letters raised at least a question as to waiver, I would consider the March 2 letter irrelevant. Having impliedly waived by its actions the right to arbitrate the dispute, the Appellant could not revive it by subsequent acts. *Bielski v. Wolverine Ins. Co.*, 379 Mich. 280, 150 N.W.2d 788 (1967).

I would affirm the judgment of the District Court.

APPENDIX 4

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 6, 1970)

Motion for extension of time to file petition for rehearing is denied for the reason it was not filed within 14 days from the entry of judgment as required by Rule 40 of the Federal Rules of Appellate Procedure.

Entered by order of the Court.

Carl W. Reuss
Clerk

FILE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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GEORGE W. RILEY and GOLDIE I. RILEY,
Petitioners,

vs.

No. 1601

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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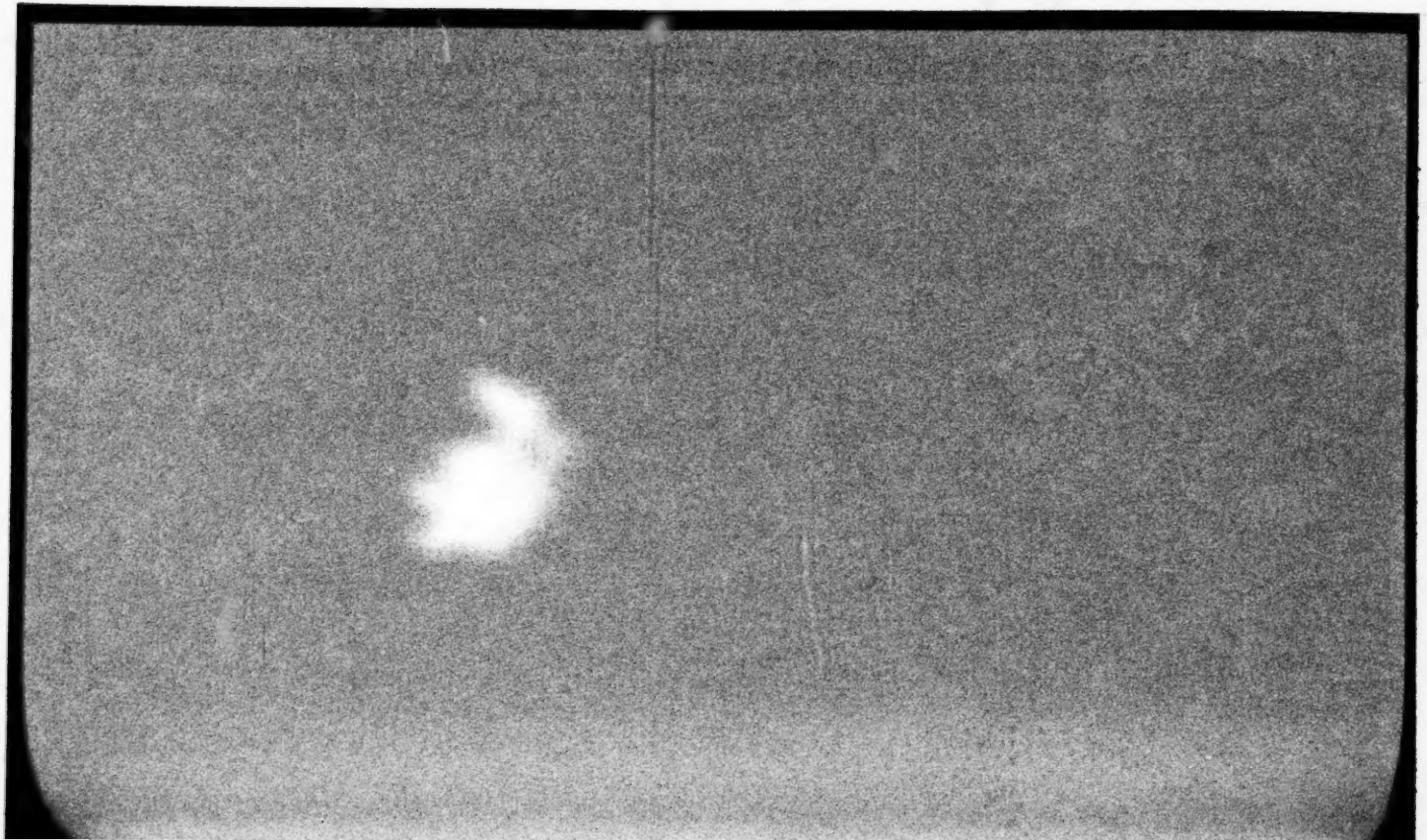

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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GEORGE W. RILEY and GOLDIE I. RILEY,
Petitioners,

vs.

No. 1601

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

In addition to the questions set forth in the plaintiffs' petition for certiorari, we submit the following questions presented:

I. Whether the petition should be considered when the petitioner has not filed his petition within the proper time, namely within ninety (90) days from the date of entry of the judgment on January 28, 1970, as required by Title 28, U.S.C.A., Section 2101(c).

II. Whether there were any special and important reasons for granting the petition.

STATEMENT OF THE CASE

The excellent opinion of the Court of Appeals sets forth the facts and covers each of the issues of law.

In addition to the arbitration provision quoted in the footnote of the opinion, there was the exclusion clause Insuring Agreement III which relates to the uninsured motorist coverage provision of the policy. The exclusion provision relating to uninsured motorist coverage provides:

> "*Insuring Agreement III does not apply:*
>
> "(a) to bodily injury to an insured, or care or loss of services recoverable by an insured, with respect to which such insured, his legal representative or any person entitled to payment under this coverage *shall, without written consent of the company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor;* . . ." (our italics)

The coverage provision of the defendant's policy agreed to pay to its insured, the plaintiffs, the sums the insured were legally entitled to recover from the operator or owner of an uninsured automobile, namely the Williams. And the insuring agreement then concluded:

> ". . . provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration."

Paragraph 15 reads in part:

> "If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount payable

hereunder, then each party shall, upon written demand of either select a competent and disinterested arbitrator."

The provision then provides for the selection of arbitrators and the place of holding the arbitration hearing.

The plaintiffs' complaint in the District Court requested that the Court adjudge the arbitration clause unenforceable, or in the alternative that defendant has waived the clause, and that the exclusion clause under Agreement III (a) requiring written consent of the defendant before plaintiffs might prosecute to judgment against the uninsured motorist be declared null and void as against public policy, that the Court declare the default judgment obtained in the Circuit Court of Mecosta County, Michigan against the uninsured motorist binding as against the defendant under said uninsured motorist clause, both as to liability and amount, and that judgment be entered for the plaintiffs against the defendant in the sum of Twenty Thousand ($20,000.00) Dollars plus interest, and any punitive damages and costs (7a) — (Figures followed by little "a" refer to appendix in Court of Appeals).

The answer of the defendant set forth and alleged the arbitration agreement was not void as against public policy, and further that the exclusion clause was binding and enforceable and was not null and void as against public policy (22a-23a).

The defendant insurance company also moved for summary judgment in the instant action on the basis of failure to arbitrate and failure to secure written consent to the judgment in the Circuit Court of Mecosta County, Michigan, which barred bringing of the instant suit. For the same reasons, defendant also moved for a directed verdict of no cause of action at the conclusion of the plaintiffs' case. The Trial Court by written opinion denied this motion (84a-90a).

At the trial, the Trial Court struck or took out the exclusion clause from the case and refused to consider it (44a, 45a-46a).

The judgment was entered in the District Court on October 23, 1968 (83a). Notice of appeal to the United States

Court of Appeals was filed on October 29, 1968 (2a). Within forty (40) days thereof, namely on December 6, 1968, an order on written ex parte petition or motion was entered by the District Court extending the time for filing the record and docketing the appeal in the Court of Appeals for a period of ninety (90) days from October 29, 1968.

On January 7, 1969, defendant forwarded a copy of the order to plaintiffs' attorney. On January 8, 1969, the District Court filed its written opinion in the case (84a).

On January 27, 1969, the record, including the entire transcript of testimony, was filed and docketed in the Court of Appeals. Within ten (10) days, in fact one day later, on January 28, 1969, the defendant-appellant forwarded to appellees' counsel a designation of the contents of the appendix and statement of issues involved. On or about January 31, 1969, plaintiffs' attorney moved to dismiss the appeal. The matter was fully briefed by both parties. The Court of Appeals then advised that the matter was passed to hearing on oral argument.

At the beginning of the oral argument in the Court of Appeals, Chief Judge Weick advised the defendant's counsel that it would not be necessary to argue the motion to dismiss.

The instant petition for certiorari was not docketed in this Court until May 25, 1970. No order granting an extension was entered.

ARGUMENT

I. Petition for writ of certiorari not filed in time.

Title 28, U.S.C.A., Section 2101(c) provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Plaintiffs' attorney presented a motion for extension of time after the 90 day period had expired and the motion was refused by the Clerk of the Supreme Court.

Rule 34 of the Rules of the Supreme Court of the United States provides in part:

> • • •
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> 2. • • • "Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstance if filed during the last ten days of such period."

In *Bradford Electric Light Co., Inc. v. Clapper*, N.H. 52 Sup. Ct. Rep. 118, 284 U.S. 221, 76 L.Ed. 254, the Supreme Court held that application for certiorari must be made within the time limited.

Accordingly we respectfully submit that the writ should be denied.

II. The matter does not merit review.

Certiorari is a discretionary writ. *Hyde v. Shine*, 25 Sup. Ct. Rep. 760, 199 U.S. 62, 50 L.Ed. 1101.

In footnote 43 of Title 28 U.S.C.A. Sec. 1254, at page 66 it is said:

> "Jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or secure uniformity of decisions." (Many cases cited).

Rule 23 of the Rules of the Supreme Court of the United States provides in part:

> "1. The petition for writ of certiorari shall contain in the order here indicated —
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> • • •

"(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix."

The petitioners have not referred to this section in their petition, since no constitutional provision, treaty, statute, ordinance or regulation of the United States is involved.

The sole question involved is interpretation of Michigan law. There is no conflict between decisions of different Courts of Appeals, nor is the decision of the Court of Appeals in conflict with any decision of this Court.

Even had the petition been filed within the proper time, we submit the matter does not merit review by certiorai.

III. Decision of Court of Appeals entirely proper.

1. (I) The motion.

Petitioners claim error because their motion to dismiss the defendant's appeal was not specifically referred to in the written opinion of the Court of Appeals.

The matter was fully briefed before the Court of Appeals. That Court was obviously familiar with the motion and had considered it for at the oral argument the Court advised the defendant's counsel that it would not be necessary to orally argue the motion.

It is apparently plaintiffs' present contention that where an extension of time has been granted beyond the original 40 day period within which to docket the case in the Court of Appeals, that the appellant shall nevertheless have the appeal docketed and file a "partial record in the Court of Appeals" within the 40 days. We submit the contention is wholly without merit.

Reference to Rule 11 of the Federal Rules of Appellate Procedure (a) discloses that the record shall be transmitted within 40 days after filing the notice of appeal "unless the time is shortened or extended by an order entered

under subdivision (d) of this rule." Subdivision (d) provides that an order may be entered upon request extending the time for transmitting the record, not exceeding 90 days from the date of filing of the first notice of appeal. Accordingly where an extension order has been entered for 90 days, we submit it is clear that the record need only be transmitted by the Clerk within the extended 90 day period, and not within the original 40 day period as claimed by the petitioner.

And Rule 12(a) of the Federal Rules of Appellate Procedure provides for the docketing of the appeal "within the time allowed or fixed for transmission of the record."

And Rule 11(c) of the Federal Rules of Appellate Procedure to which petitioner refers states:

> "Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12(a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record."

There was no temporary retention of the record in our case, and accordingly this provision is not applicable. By transmitting the record and docketing the case within 90 days, the Rule has been fulfilled.

The above provision we submit provides that a record may temporarily be held back in the District Court for use in preparing the brief but nevertheless the case shall be docketed and a partial record in the form of the docket entries, forwarded within the 90 day period.

We submit there is absolutely nothing to require the defendant to docket the case within 40 days and send up a partial record at that time as petitioner claims.

Petitioner claimed Rule 10(b) had not been complied with.

Rule 10(b) of the Federal Rules of Appellate Procedure provides in part:

> "Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record."
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> • • •
>
> "Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal."

In our instant case, the "entire transcript" was filed and accordingly there was no need to designate the parts of the transcript which appellant intended to present, to include in the record. Defendant properly designated the appendix as provided in Rule 30(b) of the Federal Rules of Appellate Procedure.

Plaintiffs also objected to the ex parte request or motion for extension of time to docket the case. It is the duty of the Clerk of the District Court to transmit the record to the Court of Appeals. Rule 11(b) of the Federal Rules of Appellate Procedure. And Rule 11(b) provides for a "*request* for extension" of time for transmitting the record. It does not provide for a motion. This "request" is often made by the Clerk himself. This ex parte procedure has been normal, ordinary, well recognized procedure and has been accepted for many years.

Under the prior rule, Cyc. of Federal Procedure, Sec. 60.-104 it is said:

> "In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than ninety days from the date of filing the first notice of appeal."

The defendant's attorney set forth the reasons in his written request or motion why the extension of time should be given and the Trial Court in his discretion entered an order of extension. Plaintiff was not harmed in any manner. Defendant's brief was promptly filed by March 6, 1969. Plaintiffs' attorney himself asked for an extension of time to file his brief.

The plaintiffs' objections were technical and we submit without merit. In any event, the Court of Appeals has discretion in dismissing appeals. Plaintiffs have cited no authority, and we know of none requiring an appellate court to specifically discuss each and ever ground raised.

Plaintiffs' objection regarding the appeal procedure certainly does not in our opinion merit consideration by this Court.

2. (II) Decision does not reverse long established Michigan law.

On December 12, 1963, the plaintiffs were involved in an automobile accident with one Williams. On November 26, 1965 without the knowledge or consent of the defendant, the plaintiffs filed a suit in the Mecosta Circuit Court of Michigan against the Williams.

The plaintiffs had a perfect right, if they chose, to sue and attempt to recover from Williams. In the event Williams was uninsured and if they wished to hold defendant insurance company under their uninsured motorist pro-

vision, the plaintiffs first had to secure the consent from the insurance company to institute such suit. This was not done. They did not even notify the defendant for approximately two years that the suit had been instituted. By letter dated January 17, 1966 (Monday) plaintiffs' attorney wrote to the defendant's agent in Big Rapids, Michigan, advising that the defendant should have never settled the claim of the Williams against the plaintiffs. And the plaintiffs' attorney also stated he was going to take a default judgment that Thursday. That information meant nothing to the defendant, since no claim had ever been made against the defendant insurance company under the uninsured motorist provision. On January 20, 1966 and by letter dated February 4, 1966, after the default judgment had been taken, the plaintiffs made claim for the first time under the uninsured motorist provision.

And in our case the plaintiffs never offered or demanded to arbitrate nor did defendant refuse arbitration. Arbitration is called for under the uninsured motorist provision, when the insured and the insurer cannot agree on liability or fault as between the insured and the third party, or the amount of the damages. *Frager v. Pennsylvania General Insurance Co.*, 231 Atl. 2d (Conn) (1967) 531, 533.

Thus denying liability or fault of the third party for the accident is entirely consistent with the demand for arbitration under the uninsured motorist provision of the policy. See *VanHorn v. State Farm Mutual Auto. Insurance Co.*, 283 F.S. (E.D. Mich) aff. 391 Fed. 2d (6 C.A.) 1968, 910; *Norton v. Allstate Insurance Co.*, 226 Fed. Supp. (E.D. Mich) 373.

For every statement of law in the opinion of the Court of Appeals there is law to substantiate that statement.

At page 28 of the plaintiffs' petition, the opinion of the Court of Appeals properly cites authority for the proposition that Michigan favors arbitration and that it is not contrary to public policy.

Further that the exclusion clause is valid and binding. See *Oren v. General Accident Fire & Life Assurance Corp.*, 175 So. (2) (D.A. Fla.) (1965) 581; *Cotton States Mutual Insurance Co. v. Torrance*, 137 S.E. (2) (Ga) (1964) 551,

aff. in 140 S.E. (2) (Ga.) 840; *Bass v. Aetna Casualty & Surety Co.*, 199 So. (2) (C.A. Fla) 790; *Travelers Indemnity Co. v. Kawalski*, 43 Cal. Rep. (D.A. Cal) (1965) 843. See also *M.F.A. Mutual Insurance Co. v. Bradshaw*, 431 S.W. 2d (Ark) (1968) 252 for a full discussion of the exclusion clause.

And in footnote 3 of the opinion of the Court of Appeals, (p. 30 petition for certiorari) the case of *Naparstek v. Citizens Mutual Ins. Co.*, 19 Mich App. 53, 172 N.W. 2d 205 is cited. In that case the exclusion clause was held applicable.

Nor was there any claim nor could there be any claim that the insurance company unreasonably or arbitrarily withheld its written consent to the suit. It was never asked to give its consent.

The opinion of the Court of Appeals is entirely in accord with Michigan law. The exclusion clause alone bars recovery in this case and should alone speedily dispose of the case.

3. (III) Defendant had no right to set aside the default judgment.

The uninsured motorist provision does *not* afford coverage to the uninsured motorist; it affords the insured additional protection. In *Laird v. Nationwide Insurance Co.*, 134 S.E. 2d (S.C.) 206 at pp 208 and 209 the Court said:

> "It is not the purpose of the uninsured motorist law to provide coverage for the uninsured vehicle but its object is to afford the insured additional protection in the event of an accident. Horne v. Superior Life Ins. Co., 203 Va. 282, 123 S.E. 2d 401.
>
> • • • •
>
> "Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one ex delicto and the only issues to be determined therein are the liability and the amount of damage."

And in *Allstate Insurance Co. v. Charneski*, 114 N.W. (2) (Wis) 1962, 489 at page 493 the Court said:

> "The purpose of such provision for agreement or arbitration is to protect the insurer offering uninsured motorist coverage from a determination made in a suit which is either uncontested or inadequately contested by the other motorist. The determination that the other driver is uninsured is of basic importance to the liability of the insurance company providing uninsured motorist coverage."

See also Couch on Insurance (2) (1964) Sec. 45:619.

While plaintiffs' attorney apparently recognizes that the defendant did not have sufficient time to intervene prior to judgment in the Circuit Court, he claims the defendant could have intervened and appealed following the default judgment. The default judgment was taken January 20, 1966; by letter dated February 4, 1966 addressed to an agent of the defendant in Big Rapids, the plaintiffs' attorney enclosed copy of the default judgment and made claim for the first time under the uninsured motorist provision. Under Michigan law, a person has 20 days within which to appeal from a judgment. This would have given the defendant about five days within which to attempt to intervene and appeal.

Moreover the Court of Appeals properly said:

> "As we have previously pointed out, the company had no right to represent Williams in the Circuit Court and had no right to move to set aside the default judgment against him. We also question its right to intervene on its own behalf.
>
> "Rileys came within exclusion (a) of the policy by prosecuting to judgment the claim against Williams without the consent of State Farm. Because of the operation of exclusion (a), State Farm was completely relieved of any liability under coverage U of the policy. Therefore, regardless of the outcome of the action in the Mecosta County Circuit Court, State

Farm had no right to intervene since it was not a party in interest." (p. 31-32, Petition for Certiorari)

The Court of Appeals properly recognized that the policy does not afford coverage to the uninsured motorist. The defendant insurance company does not represent him. If the defendant insurance company were to intervene in the case between the insured and the third party, then insurance would be brought into the case to the detriment of their own insured. The insurance company could not put itself on both sides of the fence. See *Harrison v. Ford Motor Co.*, 370 Mich. 683, 687; 24.13030 M.S.A., *Felice v. Weinman*, 372 Mich. 278, *Fosness v. Panagos*, 376 Mich. 485.

Assuming further that an insurance company can intervene itself in a case, we have the further point that the insurance company cannot set aside a default entered against the uninsured motorist. Rule 520.1 of the Michigan General Court Rules provides in part:

> "Once a default of any party has been duly filed or entered, *that* party shall not proceed with *his* case until *his* default has been set aside by the court in accordance with sub-rule 520.4." (our italics)

Plaintiffs' attorney has cited no authority that the Court of Appeals was in error in stating that the insurance company had no right to represent Williams and to set aside the default entered against *him*.

Furthermore the Court of Appeals was clearly correct in holding that the insurance company had no interest in that case and accordingly could not even intervene.

4, 5 & 6. (IV., V. & VI.) Exclusion clause valid and enforceable.

We have already discussed and pointed out that the exclusion clause is valid, binding and enforceable in Michigan. There exists no confusion on this point.

As previously pointed out, the exclusion clause bars recovery in the instant case regardless of any other point.

CONCLUSION

The petition for certiorari was not timely filed. There is no substantial issue under State law; there is no Federal issue involved. The opinion of the Court of Appeals is an excellent well reasoned opinion, and as stated above, for any one of several reasons, the plaintiffs are not entitled to recover against the defendant insurance company in the instant case.

RELIEF

Wherefore the defendant-respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari.

All of which is respectfully submitted.

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